# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1265

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

*Petitioners,*

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KEITH M. STIDD
City Attorney
and
ARVID M. FALK
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2017
*Attorneys for Petitioners*

1972—Northwest Brief Printing Co., 322 South Fourth St., Minneapolis 55415 338-5078

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ: | |
| 1. The decision below conflicts with the provisions of the Fourteenth Amendment and the Civil Rights Laws, 42 U.S.C. § 1981 et seq. and 42 U.S.C. § 2000e et seq. | 8 |
| 2. The decision below frustrates the public's interest in having the best qualified firemen, which interest precludes preferential hiring on the basis of race | 14 |
| 3. The decision below raises significant and important issues and problems which should be resolved in this Court | 15 |
| Conclusion | 16 |


## APPENDIX INDEX


| | Page |
|---|---|
| Appendix I—Opinion dated September 9, 1971 | A- 1 |
| Appendix II—Opinion dated January 7, 1972 | A-23 |
| Appendix III—Chapter XIX, Charter of the City of Minneapolis | A-35 |
| Appendix IV—Rules of Civil Service Commission of City of Minneapolis, as amended through November 2, 1970 | A-39 |
| Appendix V—Minnesota Statutes 1969, Veterans Preference Act, §197.45 | A-41 |

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Bolling v. Sharpe, 347 U.S. 497 (1954) | 13 |
| Butler, et al., v. Pennsylvania, 51 U.S. 402 (1850) | 14 |
| Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) | 14 |
| Crawford v. Davis, 249 F. Supp. 943 (U.S.D.C. E.D. Pa., 1966, cert. denied 383 U.S. 921) | 14 |
| Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971) | 8, 10, 13 |
| Keim v. United States, 177 U.S. 290 (1900) | 14 |
| Morbeto v. United States, 393 F. Supp. 313 (U.S.D.C. C.D. Calif. 1968) | 14 |
| Pickering v. Board of Education, 391 U.S. 563 (1958) | 14 |
| Schneider v. Ruck, 377 U.S. 163 (1964) | 13 |
| Shapiro v. Thompson, 394 U.S. 618 (1969) | 13 |
| Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) | 11 |
| White v. Berry, 171 U.S. 366 (1898) | 14 |
| Yakus v. U. S., 321 U.S. 414 (1944) | 14 |

| Statutes and Constitution: | Page |
|---|---|
| 42 U.S.C. § 1981 et seq. | 8 |
| 42 U.S.C. § 2000e et seq. | 8 |
| U. S. Constitution, Fourteenth Amendment | 8, 15 |

**Secondary Authorities:**

Harvard Law Review, Vol. 84:09, 1971, "Employment Discrimination and Title VII of the Civil Rights Act of 1964", page 1114 ..... 10, 12

# Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

*Petitioners,*

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Hugh Gallagher and Ward Canfield respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 7, 1972.

Said Petitioners were original defendants herein, having been sued individually and as Commissioners of the Civil Service Commission of the City of Minneapolis. A third

member of the three-man Commission, Gleason Glover, was an originally named defendant who did not participate in the appeal below, is no longer a member of the Commission, and has been replaced by Gerald Singer, who does not join in this petition. Neither John Proctor, named individually and as Personnel Director of the Commission, nor Elizabeth White, named individually as an Acting Personnel Director of the Commission, nor Kenneth W. Hall, named individually and as Chief of the Fire Department, now hold such positions, the latter through retirement.

## OPINION BELOW

The opinion of the Court of Appeals reported in 452 F.2d 315 (1972), including the decision of the panel of the Court of Appeals for the Eighth Circuit dated September 9, 1971, and the opinion of the Court en banc on rehearing dated January 7, 1972, appear in full in the appendix hereto. The decree which was rendered by the District Court for the District of Minnesota, dated March 9, 1971, as well as the District Court's order for stay pending appeal dated April 4, 1971, neither of which were reported, are fully set forth in the panel decision at Appendix pages A-4 through A-12.

## JURISDICTION

(i) On September 28, 1970, Respondents filed a complaint in the United States District Court for the District of Minnesota claiming jurisdiction based on 28 U.S.C., §§ 1331 and 1343 (3) and (4). Respondents requested a permanent injunction prohibiting the hiring of firemen by the City until certain Civil Service Commission regulations claimed to be discriminatory against minority applicants for the position of fireman were changed, and to require absolute minor-

ity preference to the first 20 firemen who qualified on the basis of the revised regulations and tests. Such a preliminary injunction was granted on November 5, 1970, and continues in effect at the present time.

(ii) The judgment of the Court of Appeals for the Eighth Circuit was entered on January 7, 1972, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

(1) Whether the requirement in the Court below that minority applicants for positions of fire fighter for a City be given preference over equally or superiorly qualified white applicants is constitutionally permissible.

(2) Whether the decision below is an improper interference with the City's legitimate public interest in having the best qualified firemen without regard to preferential hiring on the basis of race.

## STATEMENT OF THE CASE

Respondents brought this action as a class action on behalf of minorities under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, claiming that recruitment, examination and hiring practices of Petitioners denied them due process of law guaranteed under the 14th Amendment to the United States Constitution by discriminating against them on the basis of race or color, as well as their right to equal protection of the law guaranteed by the United States Constitution, in that their class was denied equal opportunity for employment with the Minneapolis Fire Department without any reasonable basis, and in the absence of any compelling state interest. It was also claimed that they

were denied their right to enter into employment contracts guaranteed by 42 U.S.C. 1981 by discriminating against them in seeking and obtaining employment with the Minneapolis Fire Department on the basis of race or color. It was also claimed that 42 U.S.C. 1981 would be violated if the provisions of the Minnesota Veterans Preference Law, Minnesota Statutes § 197.45 (App. V hereto), were to be enforced.

The printed Appendix containing the entire record was submitted to the 8th Circuit Court of Appeals, and parenthetical references hereafter will be to that Appendix.

The Civil Service Commission of Minneapolis undertook to set up and hold an examination for fire fighter, originally scheduled to be held in November of 1970. On October 28, 1970, a complaint was filed (A. 7-20) asking that the examination be enjoined until various alleged discriminatory matters were corrected or redressed (A. 16-19). The durational residency requirement of Minnesota Statutes 197.45, subd. 1, were also attacked (A. 19 & 20). This feature of the case was submitted to a three-judge court and is not here in issue (A. 4). A Preliminary Injunction and Order forestalling the examination was filed on November 5, 1970 (A. 24-27).

The parties stipulated into evidence examination plans, tests, answer sheets, summary sheets and materials related thereto (A. pp. 27-35, Exs. Nos. 1-35); classification plans, specifications of position duties, standards, assignments (A. pp. 31-32, Exs. Nos. 36-46).

Various surveys, reports and analyses of minority employment in the City were stipulated in (A. 32, Exs. 47 through 50) as used by the Commission and its staff in establishing minority recruitment programs. Positive, direct, affirmative and deliberate efforts by the Civil Service Commission and

other community resources were undertaken beginning with the "Policy Statement for Employment" of the Commission in November, 1969 (A. p. 32, Ex. 51), and continuing with the Commission's "Employment Program Objectives" (A. p. 32, Ex. 52), and "Summary and What Has Been Done Toward a Positive Minority Employment Program", dated Nov. 14, 1969 (A. p. 32, Ex. 53).

Further evidence of the real effort by the Commission, its staff, and others to enhance minority employment in the City is provided in the Exhibits 53 through 67 as described in the stipulation (A. pp. 32 and 33).

At least as early as 1967 the Civil Service Commission became concerned about minority recruitment and it instructed its staff to encourage minorities and blacks in particular to be given a fair chance in terms of examinations (A. 193). Objections had been made that oral examinations were discriminatory and they were eliminated in 1955 (A. 197).

Positive and affirmative efforts were made in connection with the examination here proposed to be given to gain the attention of and to recruit the participation of minority applicants. "For the first time the Civil Service Commission, minority organizations and representatives of the fire fighters union were working together in a constructive way to try to alleviate some of the problems facing. I will say it in terms of, equal opportunity in the Fire Fighters Department" (A. 111, 199). Recruitment efforts were felt to be on the right track (A. 129). A pre-employment testing program was undertaken. A major involvement in the recruiting effort was that by the Civil Service staff in the pre-test tutoring session (A. 224 & 225). Twenty-seven such sessions for fire fighter prospects were held in the summer of 1970 (A. 279).

Particular attention was paid by the Commission and its staff to the impending fire fighter tests to overcome any barriers to minorities, both in testing and recruitment (A. 275, 318). Out of almost 500 applicants 25 stated they were of minority groups (A. 298).

A primary concern on the part of the Commission and its staff was to be sure that the fire fighter's test was validated, both in terms of relevancy to the job and that there be no cultural or racial discrimination or bias (A. 109).

It had not been customary either in Minneapolis or on a national basis to validate such examinations, but when the possibility of cultural bias first came to the Commission's attention it was decided to do two things: one was to hire someone who was competent in the area, and the other to hire a consultant firm to set up a validation program, which has been done by contracting with a consultant and hiring a research analyst with a master's degree in the area of testing (A. 274).

The Commission was concerned with other requirements for the position of fire fighter as to whether the requirements were necessary or unnecessarily discriminatory.

The principal issue involving a serious constitutional question is the granting of preference to minority applicants, and discrimination in that process against superiorly qualified white applicants.

In the decree of the District Court for the District of Minnesota, found in the Appendix hereto beginning at page A-4, Judge Larson ordered that there be "given absolute preference in certification of fire fighters with the Minneapolis Fire Department to twenty (20) Black, American Indian, or Spanish-Surnamed-American applicants for fire fighter who qualify for such positions on the basis of the examinations

given . . . and who meet the requirements of said (validated) examination plans." The Court decreed also at pages 5 and 6 of the Appendix hereto that the officers of the City be enjoined from enforcing the provisions of Minnesota Statutes § 197.45 (the veterans preference statute) (App. V hereto), and the provisions of the Minneapolis City Charter, Chap. 19, §§ 7 and 15 (the basic provisions of our Civil Service Merit System, designed to promote efficiency in the City service, requiring that appointments to the civil service should be based upon merit, determined by fair, public, competitive, impartial and nondiscriminatory examinations and testing procedures), found in App. III and IV hereto.

On appeal to the United States Court of Appeals for the 8th Circuit, a three-judge panel rendered a decision on September 9, 1971, which is appended hereto at pages A-1 to A-22. It struck down the absolute minority preference granted in the District Court on the grounds that "U.S.C. § 1981 and the 14th Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks."

Petition was made for rehearing by the 8th Circuit en banc which was granted. In its decision filed January 7, 1972, appended hereto at pages A-23 through A-34, the panel decision was adopted except as to the minority preference issue. It held that "the absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions" and stated "we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another". It held that in view of what it found to be past discrimination, minority preference

should be granted to 20 firemen out of the next 60 hired, on the basis that there be 1 out of every 3 persons hired who would be a minority individual, until at least 20 minority persons have been so hired.

## REASONS FOR GRANTING THE WRIT

### 1. The decision below conflicts with the provisions of the Fourteenth Amendment and the Civil Rights Laws, 42 U.S.C. § 1981 et seq. and 42 U.S.C. § 2000e et seq.

In its January 7, 1972 opinion, the majority of the 8th Circuit Court stated:

> "The panel opinion, while sustaining most of Judge Larson's findings and orders granting affirmative relief, did not approve of the absolute preference in Fire Department employment to 20 minjority persons who met the qualifications for the positions under the revised qualification standards established by the decree and held that the absolute preference order infringed upon the constitutional rights of white applicants whose qualifications are established to be equal or superior to the minority applicants. That panel held:
>
> > "'Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks.'"

It then quoted *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971):

> "'Congress did not intend by Title VII, however to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority

group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' 401 U.S. 424, 430-31."

As to this being a landmark decision and one of first impression the Court said (A. II. 25 & 26):

"The absolute preference of 20 minority persons who qualify has gone further than any of the reported appellate court cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified.

"The panel opinion has recognized the illegality of the past practices, has ordered those practices abandoned, and the affirmative establishment of nondiscriminatory practices and procedures. There is, as the panel pointed out, no claim or showing made that the plaintiffs were identifiable members of the class who had made prior applications for employment and were denied employment solely because of race. This latter situation could be remedied immediately by ordering the employment of such persons. However, in dealing with the abstraction of employment as a class, we are confronted with the proposition that in giving an absolute preference to a minority as a class over those of the white race who are either superiorly or equally qualified would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution."

The Court pointed out that the total minority population of the Minneapolis area was 6.4% in 1970, and that Black population was 4.3%. However, it should be noted that as to the significance of the proof of discriminatory practices now or in the past, those present members of the department

who entered city service in the 1940s did so when the black population of Minnesota amounted to 0.36% and the total minority population amounted to 0.84%, and in Minneapolis 0.94% black and 1.07% total; in the 1950s when there were 0.47% blacks and a total of 0.97% with the corresponding figures for Minneapolis alone of 1.30% and the total 1.62%; in the 1960s when the figure reached 0.65% and 1.23% for the State and 2.44% and 3.23% for the City. These figures (1970) for the present day with which we are all concerned and endeavoring to cope are larger but still of modest proportions: 0.92% black and 1.81% total for the State, and 4.37% black and 6.44% total for the City (A. p. 53, Ex. 85, Table I, and A. p. 55, Table III). As for black males in proportion to the total male population, the 1970 figure is 4.70% for Minneapolis.

Under these circumstances we believe that the courts below have indulged in an unwarranted and excessive principal reliance on statistics relating to the present lack of minority representation in the Fire Department in support of their finding that there must have been past discrimination. See Harvard Law Review, Vol. 84:69, 1971, "Employment Discrimination and Title VII of the Civil Rights Act of 1964", page 1114.

In *Griggs, supra*, at page 436 of the report, this Court concluded:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controll-

> ing factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

While the Court sitting en banc declared that the granting of absolute preference to the first 20 minority firemen was constitutionally unacceptable, it proceeded to find that a dilution of this absolute preference to provide that if need be one out of every three minority applicants in order would have to be absolutely preferred over equally or superiorly qualified white applicants. No logical, justifiable basis can be seen for such an abandonment of the basic constitutional principle through specious dilution of it.

In this connection it should be noted that one of the members of the original panel, Van Oosterhout, Senior Circuit Judge, dissented, and was joined by Mehaffy, Circuit Judge, in that dissent. The dissent said as to such provision (App. II hereto):

> "Such provision . . . is vulnerable to the same constitutional infirmity as Judge Larson's absolute preference provision. This court's minority preference provision will not discriminate against as many white applicants as Judge Larson's decree but it will still give some minority persons preference in employment over white applicants whose qualifications are determined to be superior under fairly imposed standards and tests.
>
> "Employment preferences based on race are prohibited by the Fourteenth Amendment."

Judge Van Oosterhout referred to the case upon which the largest reliance was placed by the majority, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and quite properly distinguished it by stating that "whites have no right to insist upon segregated schools, while white as well as Black

applicants cannot be denied employment on the basis of race."

He also disposed of the pretext that past discrimination if it existed is a present justification for discrimination by stating:

> "Past general racial discrimination against Blacks under the circumstances of this case does not justify unconstitutional present racial discrimination against white applicants."

The Harvard Law Review article cited above, in discussing the principles of color blind hiring and school integration, stated:

> "Moreover, color blindness may be constitutionally required. Equal protection and due process require at least that any government action which is predicated upon color must be necessary to the attainment of an overriding governmental purpose. It may mean even more than this; there may be no governmental purpose which can justify state action imposing burdens on the basis of race. An analogy might be drawn to school integration where courts, as a remedy for state-imposed segregation, have specified quotas for the integration of faculty and student body. But that analogy is inapposite. The judicial theory of school integration has been that children are helped by integration or, at the least, that white children are not harmed by it. When the government requires that a black man be given a job in preference to a more qualified white, harm predicated on race is clear. The standard of color blindness is also supported by considerations of fairness to white workers and to employers. The individual worker or employer may have had no part in discrimination against blacks; to impose on him the costs of remedying societal discrimination seems unjust. It is all the more unjust since the burden would fall most heavily on whites who are themselves relatively deprived."

In *Griggs, supra*, the Court pointed out that all employment decisions not related to job performance were arbitrary and consequently illegal. Increased recruitment meets the job relationship requirement, for increased recruitment enlarges the available pool of job applicants and consequently improves the chances that the best qualified candidates will be hired. Job skill training is ipso facto job related.

In contrast, affirmative relief calling for the hiring of persons on the basis of their race or national origin is clearly arbitrary. No basis exists for concluding that minority persons will perform more successfully the duties of fireman than whites and, therefore, the absence of a proven relationship between race and job success makes the hiring on the basis of race clearly arbitrary. *Griggs, supra*, at 431. Arbitrary classifications based on race or anything else are clearly unconstitutional. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964).

As far as the other legal authorities cited below in support of their finding that there should be minority preference, these are all cases in the private sector, and in none of these cases were applicants for membership in a union or for employment also afforded or had available to them anything like the non-discriminatory merit system of civil service employment we have guarded by state and local laws and ordinances such as are here under attack.

We believe preferential minority hiring under the circumstances of our case is unconstitutional as the original Court of Appeals panel held, and which the full Court approved in principle. It is no cure of that constitutional infirmity to unconstitutionally discriminate once out of every three times, or to unconstitutionally discriminate just occasionally for a

while, or for a limited time. One either discriminates on account of race or one does not.

**2. The decision below frustrates the public's interest in having the best qualified firemen, which interest precludes preferential hiring on the basis of race.**

Insofar as government employment litigation is concerned, the "problem in any case is to arrive at a balance between the interests of the (applicant or employee) . . . and the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1958).

The courts have consistently recognized the importance of government efficiency by avoiding any action which could interfere with it. See *Keim v. United States*, 177 U.S. 290, 293 (1900); *White v. Berry*, 171 U.S. 366, 378 (1898).

On balance the interest of the City of Minneapolis in promoting the efficiency of its Fire Department by having it composed of the best qualified individuals is of paramount interest. No injunctions should have been issued or continued preventing the municipality to proceed and continue to conduct its vital and necessary fundamental concerns and business as was here done. Injunctions against the carrying out of the merit provisions of the City Charter and the provisions of the Veterans Preference laws should not have been granted. See *Butler, et al., v. Pennsylvania*, 51 U.S. 402 (1850); *Yakus v. U. S.*, 321 U.S. 414 (1944); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Crawford v. Davis*, 249 F. Supp. 943 (U.S.D.C. E.D. Pa., 1966, cert. denied 383 U.S. 921); *Morbeto v. United States*, 393 F. Supp. 313 (U.S.D.C. C.D. Calif. 1968).

**3. The decision below raises significant and important issues and problems which should be resolved in this Court.**

Fair, impartial and non-discriminatory employment of public servants is an important objective which public bodies in the United States have come a long way toward achieving in the over-all public interest through federal, state, and local laws, ordinances and practices. Whether it is now appropriate or defensible to inject into this body of law and in the face of the Fourteenth Amendment prohibition against race discrimination court-sanctioned minority preference, however diluted, which utterly abrogates hard-fought-for principles of merit in the public civil service is of the utmost importance and concern to the citizens of our country and the various public bodies that govern them, from the lowest local level up to the federal government itself.

The question here is one of manifest and obvious importance which, as was to be expected, has created wide-spread interest and inquiry. As one might also expect, it has also created considerable confusion as to what the final answer will be. Up to now in this case three answers have been made:

(1) That there should be in public employment immediate absolute preference given to minorities on the grounds of their race or color if there is any evidence of past discrimination.

(2) That there should be no discrimination in public employment on the grounds of race or color; and

(3) That a little, or partial, or temporary discrimination on the grounds of race or color is constitutionally justified.

The final answer to the problem here raised is of vital and profound importance to the thousands of governmental en-

tities and millions of government employees who are deeply concerned. Only this Court can provide this answer.

## CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

KEITH M. STIDD
City Attorney
and
ARVID M. FALK
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2017
*Attorneys for Petitioners*

# APPENDIX I

---

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

No. 71-1181

---

Gerald Carter, et al.,
Plaintiffs-Appellees,
and
Minneapolis Commission on Human Relations,
Plaintiff-Intervenor-Appellee,
vs.
Hugh Gallagher, et al.,
Defendants-Appellants.

---

Appeal from the United States District Court for the District of Minnesota.

---

[September 9, 1971.]

---

Before MATTHES, Chief Judge, VAN OOSTERHOUT, Circuit Judge, and EISELE, District Judge.

---

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by defendants from decree enjoining them from holding examinations and setting standards for the purpose of determining qualifications of applicants for positions on the Minneapolis Fire Department until var-

ious racially discriminatory practices are corrected as directed in the trial court's decree and providing for absolute minority preference in employment of twenty minority persons.

This action for injunctive and declaratory relief was brought by five Blacks on behalf of themselves and all persons similarly situated. The classes represented by plaintiffs are:

(a) All those Black, Indian and other minority persons presently applying for employment with the Minneapolis Fire Department.

(b) All those Black, Indian and other minority persons in the City of Minneapolis who are not applicants for employment with the Minneapolis Fire Department either because their applications were not approved or because they believed that equal employment opportunity is denied to Black, Indian and other minority applicants for such employment.

For convenience the plaintiffs and the classes they represent will usually be referred to as minority persons.

The defendants, who are sued in their official capacity and individually, are Gallagher, Glover and Canfield, the members of the Civil Service Commission of the City of Minneapolis; Proctor, the Personnel Director of the Commission; and Fire Chief Hall.

The court permitted the case to proceed as a class action. No challenge is made to class representation.

The Minneapolis Commission on Human Relations has intervened on behalf of plaintiffs. Fire Fighters Association of Minneapolis, Associated Fire Fighters of Minnesota and International Association of Fire Fighters have jointly filed amici curiae brief in support of defendants' position.

Included in the petition is another class represented by plaintiffs Harris and Hill consisting of:

(c) All those persons who would qualify as veterans pursuant to Minnesota Statute 197.45 in seeking to claim a veterans' preference pursuant to said section but for the state and local durational residency requirements imposed therein.

The class "c" plaintiffs make the contention that the five-year durational residency requirement incorporated in the definition of veterans in the Veterans Preference Act, Minnesota Statute 197.45, unconstitutionally imposes a penalty on the right to travel interstate. A three-judge court was designated to try such issue and hence the issue is not adjudicated in the present action. Judge Larson, who tried this case, entered a temporary restraining order prohibiting defendants from denying veterans preference under § 197.45 to any applicant for employment by reason of failure to meet residence requirements incorporated in the statute. Appeal from the granting of the temporary restraining order has been taken. However, no attack on the order is made in the briefs, and hence we give such issue no consideration at this time.[1]

Plaintiffs assert that the recruitment, examination and hiring practices of defendants with respect to the fire department deny Blacks, Indians and other members of minority groups the right to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment and the right not to be discriminated against in employment by reason of race as guaranteed by 42 U.S.C.A. § 1981.

---

[1]We are informed that the designated three-judge court by order filed August 6, 1971, determined that the § 197.45 issue could be resolved by a single judge and dissolved itself. No further action has been taken on this issue.

This case was tried to the court. Much of the evidence was stipulated. An evidentiary hearing was held, a number of witnesses were produced and examined. The evidence to the extent necessary will be discussed in the course of the opinion.

Judge Larson made 146 findings of fact, which generally upheld plaintiffs' contentions, and appropriate conclusions of law. Based thereon, he entered a decree, not reported, on March 9, 1971, which reads as follows:

> "The plaintiffs have moved this Court for various injunctive orders requiring the defendants to implement certain hiring practices and procedures with respect to the position of fire fighter within the Minneapolis Fire Department. The plaintiffs have also moved the Court to request the convening of a three-judge court to hear and determine the constitutionality of the five-year State and local residency requirement incorporated in the Minnesota Veterans Preference Act and to enjoin the enforcement of the requirement of said Act pending the hearing and determination of the three-judge court.
>
> "On the basis of the record and the proceedings herein, the evidence presented to the Court, the arguments of counsel, and the findings of fact and conclusions of law filed in this case this date, it is the ORDER, JUDGMENT and DECREE of this Court:
>
> "1. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, give absolute preference in certification as fire fighters with the Minneapolis Fire Department to twenty (20) Black, American-Indian, or Spanish-surnamed-American applicants for fire fighter who qualify for such positions on the basis of the examinations given pursuant to the Minneapolis Civil Service Commission fire fighter examination plan number 8326, or subsequent examination plans, and who meet the requirements of said examination plans as amended pursuant to paragraph seven (7) of this Decree.

"2. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them,

(a) establish an eligibility list of all Black, American-Indian, or Spanish-surnamed-American applicants for the position of fire fighter with the Minneapolis Fire Department who qualify for such positions on the basis of the examinations given pursuant to the Minneapolis Civil Service Commission fire fighter examination plan number 8326 and who meet the requirements of said examination plan as amended pursuant to paragraph seven (7) of this Decree, and

(b) rank said minority applicants in order of their relative standing on said examinations with those persons eligible for a veterans preference or for a residence preference given such preference on said eligibility list, and

(c) proceed with the certification of fire fighter applicants from the full eligibility list established on the basis of said examinations only after twenty positions have been filled from the eligibility list established pursuant to paragraph 2(a) of this Decree or after all persons on the eligibility list established pursuant to paragraph 2(a) of this Decree have been offered certification for the position of fire fighter with the Minneapolis Fire Department and have had a period of five (5) business days within which to accept or reject such certification.

(d) in the event that all preferred minority positions are not filled from the register established by examination plan number 8326, the same procedure will be followed on succeeding examination plans until all such twenty (20) preferred positions are filled by minority applicants.

"3. That the defendants herein, their successors in office, agents, servants and employees, and all persons in active concert or participation with them, are enjoined from enforcing the provisions of Minnesota Stat-

utes § 197.45 and the provisions of the Minneapolis City Charter, chapter 19, sections 7 and 15, insofar as such enforcement is in conflict with the Order of the Court contained in paragraph one (1) of this Decree.

"4. That the defendants Gallagher, Canfield, Glover, Proctor, and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall reopen the application period for the next examination for the position of fire fighter for the primary purpose of receiving applications from Blacks, American-Indians, or Spanish-surnamed-American persons for a period of two weeks to commence forthwith upon the completion and implementation of the affirmative recruitment program required pursuant to paragraph five (5) of this Decree.

"5. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall prepare and submit to the Court and counsel for the plaintiffs and the plaintiff-intervenor, no later than two weeks from the date of this Decree a plan for affirmative action for the recruitment of Black, American-Indian, and Spanish-surnamed-American persons for the position of fire fighter with the Minneapolis Fire Department, which plan shall include:

(a) Provision for the active participation in such affirmative action program of all the defendants in this action,

(b) Provision for consultation by the defendants herein and members of the staff of the Minneapolis Civil Service Commission with representatives of the City and community agencies and groups which have direct contact with the minority community in Minneapolis, and

(c) Provision for pretest tutoring sessions involving personnel from the Civil Service Commission staff and from the Minneapolis Fire Department, and

(d) Provision for the maximum feasible use of all communication media most likely to reach the minority community in Minneapolis, and

(e) Incorporation in the promotional material used, including all advertising used, of a statement referring to the Court's Order granting a minority preference as set forth in paragraph one (1) of this Decree, a statement regarding all changes made in examination plan number 8326 as set forth in paragraph seven (7) of this Decree, and a statement regarding the availability of pretesting tutoring sessions established pursuant to paragraph 5 (c) of this Decree.

"6. That the defendants Gallagher, Canfield, Glover, Proctor and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall not give examinations pursuant to the Minneapolis Civil Service Commission examination plan number 8326 until the following action has been taken:

(a) The written examination for fire fighter with the Minneapolis Fire Department given pursuant to said examination plan has been validated by procedures commensurate with those set forth in the Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures set forth in 35 F.R. 12333, et seq. (Aug. 1, 1970), 29 C.F.R. §§ 1607.1 to 1607.14, and

(b) The Court and counsel for the plaintiffs and the plaintiff-intervenor have been given copies of said written examination for fire fighter with the Minneapolis Fire Department and copies of all reports, including a resumé of any oral reports, which are made by the defendants, their employees, or any consultant working with them, regarding validation studies of said written examination, provided that such copies of said written examination and such copies of said reports may be given to the Court and counsel for the plaintiffs and the plain-

tiff-intervenor subject to a protective order in a form approved by the Court, and

(c) Counsel for the plaintiffs and the plaintiff-intervenor have been given notice at least two weeks prior to the date scheduled for administration of said written examination, and

(d) All action required by paragraphs four (4), five (5), seven (7) and eight (8) of this Decree has been completed.

"7. The defendants Gallagher, Canfield, Glover, Proctor, and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall make the following permanent changes in the Minneapolis Civil Service Commission fire fighter examination plan number 8326 and all subsequent examination plans:

(a) Delete therefrom any reference to the applicant's arrest record, and

(b) Incorporate in said fire fighter examination plan provisions to the effect that:

(i) no person will be rejected as an applicant for the position of fire fighter with the Minneapolis Fire Department by reason of the conviction of any felony or felonies at any time prior to five years from the date of application or by reason of the conviction of any misdemeanor or misdemeanors at any time prior to two years from the date of application, provided that the applicant was not incarcerated upon the conviction of any felony or misdemeanor during said five or two-year periods, and

(ii) no person will be rejected as an applicant for the position of fire fighter with the Minneapolis Fire Department by reason of the conviction of any felony, misdemeanor, or other criminal act, or the conviction of felonies, misdemeanors, or other criminal acts, except upon a written finding by the Civil Service Commis-

sion after notice to the applicant and an opportunity to respond in person or in writing that

a. the act or acts upon which such convictions were based, considering the circumstances in which it occurred, involve behavior from which it can reasonably be inferred that such applicant cannot adequately fulfill the duties of a fire fighter with the Minneapolis Fire Department.

(c) Delete from said fire fighter examination plan the requirement that an applicant must have a high school diploma or a G.E.D. certificate by the time he is hired, provided that an entering fireman may be required within two years of entering upon duty to obtain a high school diploma or a G.E.D. equivalency certificate, and

(d) Change the minimum age requirement as stated in said fire fighter examination plan from twenty years to eighteen years, and change the maximum age limit from thirty years to thirty-five years, provided that the maximum age may be reduced to thirty at such time as there are twenty Blacks, American-Indians and Spanish-surnamed-Americans employed by the Minneapolis Fire Department.

"8. That the defendants, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall

(a) refrain from requesting or considering any information regarding an applicant's arrest record when determining the eligibility of an applicant for a position with the Minneapolis Fire Department, and

(b) incorporate all the changes ordered in Minneapolis Civil Service Commission fire fighter examination plan number 8326 pursuant to paragraph seven (7) of this Decree in all information, pamphlets, announcements or other material utilized as

part of the affirmative recruitment program undertaken pursuant to paragraph five (5) of this Decree.

"9. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall

(a) within six months of the date of the Order, submit to the Court and counsel for the plaintiffs and the plaintiff-intervenor, a plan for affirmative action to assure that all recruitment, examination, and hiring practices followed in obtaining employees for the Minneapolis Fire Department are designed to assure equal employment opportunities for Blacks, American-Indians, and Spanish-surnamed-Americans, which affirmative plan shall include procedures commensurate with the Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures set forth in 35 F.R. 12333, et seq. (Aug. 1, 1970), 29 C.F.R. §§ 1607.1-1607.14 to insure that all examinations given to applicants for employment with the Minneapolis Fire Department are validated to insure that they do not discriminate against Blacks, American-Indians, and Spanish-surnamed-Americans, and that the results obtained will provide a reasonable prediction of job performance with the Minneapolis Fire Department, and

(b) to report forthwith to the Court and counsel for the plaintiffs and the plaintiff intervenor the number and names of all Blacks, American-Indians, and Spanish-surnamed-Americans who are certified as fire fighters pursuant to fire fighter examination number 8326, and

(c) to report forthwith to the Court and counsel for the plaintiffs and plaintiff-intervenor the names of all Black, American-Indian, and Spanish-surnamed-American applicants who are not found eligible for certification as fire fighters with the Minneapolis Fire Department or who, after being found eligible for such certification, are not in fact

certified at any time when eligible candidates are being certified, together with a statement as to the reasons for the failure to find such applicants eligible or the failure to certify them, and

(d) to report forthwith to the Court and counsel for the plaintiffs and the plaintiff-intervenor the name of any Black, American-Indian, or Spanish-surnamed-American applicant for fire fighter with the Minneapolis Fire Department who, having been certified for such employment, subsequently is dismissed or who subsequently terminates his employment, together with a statement as to the reason for such dismissal or termination.

"10. That the Court shall maintain continuing jurisdiction of this action."

(Paragraph 11 relates to the temporary restraining order on the § 197.45 issue, the attack upon which was not pursued in the present appeal.)

Judge Larson on April 4, 1971, entered an order for stay pending appeal, reading:

"Defendants move for an Order staying the Decree, particularly paragraphs 1 through 10, pending the appeal.

"Plaintiffs move for an Order to Show Cause why defendants should not be held in contempt for failure to comply with paragraph (5) of the Decree entered March 9, 1971.

"The recent decision of the United States in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), indicates paragraph 6(a) must be complied with. The Court understands that defendants are proceeding with the revision in tests and the validation thereof.

"IT IS ORDERED:

1. That defendants comply with paragraphs 6(a), (b) and (c) of the Decree of March 9, 1971.

2. That the defendants comply with paragraph (5)

of the Decree and submit such plan within two weeks of the completion of the validation of the tests.

3. That the motion for a stay be granted except as provided in 1 and 2, above."

Defendants urge that the court's judgment and decree should be reversed and vacated for the following reasons:

I. The District Court lacks jurisdiction to determine plaintiffs' claims.

II. Substantial evidence is lacking to support certain specified findings of fact, the resulting conclusions of law, and the decree and judgment.

III. The court wrongly deprived the Civil Service Commission of discretionary powers vested in it under the provisions of the Minneapolis Home Rule Charter and the rules of the Minneapolis Civil Service Commission.

IV. The court abused its discretion in granting injunctive relief since the record shows the Commission has taken steps to insure that the examination and other employment standards will not be discriminatory.

V. The court erred in ordering absolute minority preference in employment of twenty minority persons.

VI. The court erred in granting other injunctive relief.

Such contentions will be considered in the order just stated.

I.

Jurisdiction is based upon 28 U.S.C.A. §§ 1331 and 1343 (3) and (4). Defendants attack the jurisdiction of the trial court upon several grounds, all of which lack merit. Plaintiffs do not base jurisdiction on Title 7 of the Civil Rights Act of 1964. Hence the question of whether defendants come within the exclusion of a state or political subdivision there-

of from the definition of employer incorporated in Title 7 is immaterial. The claim of immunity from suit by public officials if it exists does not defeat plaintiffs' right to injunctive relief against state officials in their individual capacities where such officers have acted to deprive a person of a federally guaranteed constitutional right. *Ex parte Young*, 209 U.S. 123, 167, 28 S.Ct. 441, 52 L.Ed. 714; *Board of Trustees of Arkansas A & M College v. Davis*, 8 Cir., 396 F.2d 730, 732-33.

No claim for monetary damages is presented in this case. No exhaustion of state remedies is required under the circumstances of this case. See *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492. Jurisdiction is established under the old Civil Rights Act, 42 U.S.C.A. §§ 1981 and 1983, and 28.U.S.C.A. § 1343(3) and (4). See *Smith v. Board of Education of Morrilton Sch. Dist.*, 8 Cir., 365 F.2d 770, 773; *Penn v. Stumpf*, N.D.Cal., 308 F.Supp. 1238. The petition alleges the amount in controversy for each person discriminatorily denied employment exceeds $10,000. Thus federal question jurisdiction would also appear to be established under 28 U.S.C.A. § 1331.

II.

Defendants urge that some 27 specified findings of fact out of the 146 findings made by the trial court are not supported by substantial evidence. Such argument is summarily made. We have carefully examined the record and are convinced that the procedures existing prior to the commencement of this suit for testing applicants' eligibility for a fireman's position were racially discriminatory. The evidence shows that of the 335 men in the fire department none are Black, Indian or Mexican-Americans. Only two Blacks had served on the fire department in the recent past. Blacks constituted

6.44% of the Minneapolis population in 1970. The court found the all-White fire department was the result of past discriminatory hiring practices and procedures. Statistical evidence can make a prima facie case of discrimination. *Parham v. Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421, 426. The court found that there was no substantial evidence to rebut the inference of racial discrimination based upon the statistics.

Subsequent to the commencement of this action, the record reflects that the Commission recognized that its written examination was racially discriminatory. Substantial changes were made in its content. Consideration of the arrest record *of applicants was eliminated and other changes were made.* The record shows that Fire Chief Hall took a strong position against recruitment and employment of Blacks.

The court made no express finding of bad faith or evil motives on the part of the defendants. Neither 42 U.S.C.A. §§ 1981 nor 1983 incorporates any requirement that discrimination be wilfull or intentional. In an analogous situation arising under Title 7 of the Civil Rights Act, the Supreme Court states: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L. Ed.2d 158 (March 8, 1971).

Defendants' own testimony affirmatively shows the testing procedure in issue prior to the commencement of the action was racially discriminatory.

III.

The city of Minneapolis is governed by a Home Rule Charter under which it is authorized to establish a civil service

system for the city. The Minnesota Supreme Court in *State ex rel. Coduti v. Hauser*, 219 Minn. 297, 17 N.W.2d 504, 507, holds:

> "'The rules of the Commission, having all the force and effect of statutory law, should be sustained unless they violate constitutional guaranties, controlling state legislation or the provisions of the [Minneapolis home-rule] charter pursuant to which they were adopted.'"

The Commission, like school boards in school integration cases, has the primary responsibility for carrying out the duties assigned to it and has a large discretion in mapping the course it is to follow. However, such discretionary power does not go to the extent of authorizing the adoption of rules and procedures which violate constitutional rights of minority persons seeking employment. We have heretofore determined that the constitutional rights of minority persons have been violated by the present procedures adopted by the Commission.

IV.

Defendants contend that the court abused its discretion in granting injunctive relief and usurped the Commission's power to promulgate rules and regulations with respect to firemen's qualifications and examinations. Defendants, who are the present members of the Civil Service Commission, ever since their recent appointment have discussed their rules and examinations with civic groups and interested parties and have made changes in their rules designed to eliminate racial discrimination, and they have agreed to employ competent experts to validate future examinations and to take steps to promote recruitment of minority persons for firemen positions. In effect, they have expressed a willingness to substantially comply with the provisions of paragraphs 5 and 6 (a), (b) and (c), of the decree heretofore quoted which

are the provisions the court excluded from the operation of its stay order pending appeal. Defendants have also eliminated any consideration of arrests in determining applicants' qualifications and have made modifications in the educational and age requirements. Defendants take the position that such steps have eliminated any need for injunctive relief.

Generally the granting or denial of an injunction to remedy illegal conduct in situations where good faith effort has been made to remedy the wrong rests in the sound discretion of the trial court. *Parham v. Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421, 429; *Hodgson v. American Can Co.*, 8 Cir., 440 F.2d 916, 920.

Upon the record before us, defendants have not demonstrated that the court abused its discretion in granting injunctive relief.

V.

Defendants' most vigorous attack upon the injunction decree is directed toward paragraph 1 creating absolute preference in fire department employment to twenty minority persons who meet the qualifications for the position under the revised qualification standards established by the decree. Paragraphs 2 and 3 of the decree implement the provisions of paragraph 1.

Defendants contend that such minority preference order violates the Fourteenth Amendment in that it discriminates against White applicants whose qualifications are found to be superior to those of the minority applicants upon the basis of approved and acceptable job related tests and standards, and who, but for the minority preference requirement, would be entitled to priority in employment.

Plaintiffs, citing *Louisianna v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709, and *Swann v. Charlotte-*

*Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), urge that the District Court has the power and duty to exercise its equitable powers to fashion a remedy which will so far as possible eliminate the present effects of past discrimination as well as bar like discrimination in the future.

Courts of equity have a broad power to fashion an effective remedy. However, the power to provide an effective remedy affords no basis for depriving others of a constitutionally protected right. Plaintiffs in effect concede this in their brief when they state: "Initially, we assume the obvious—that the District Court could not order the city official to take any action which would itself be unconstitutional."

Thus we reach the crucial question which is whether giving absolute preference to twenty minority applicants who meet the qualification tests infringes upon the constitutional rights of White applicants whose qualifications are established to be superior. The trial court based the minority preference on violation of 42 U.S.C.A. § 1981 which reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Plaintiffs in their brief properly state the law as follows:

> "For the past 90 years the Supreme Court has recognized that the Congress intended section 1981 to have as broad a scope as the Fourteenth Amendment where state action is involved. In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the Court stated with respect to Rev. Stat. 1977 (now section 1981) that 'this Act puts in the form of a statute what had been sub-

> stantially ordained by the Constitutional Amendment.' 100 U.S. at 312. In context the Court is referring to the Fourteenth Amendment. On the same day, in *Virginia v. Rives*, 100 U.S. 313, 317-18, 25 L.Ed. 667 (1880), the Court treated the Civil Rights Act and the Fourteenth Amendment as coextensive in substance. The close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment has been consistently emphasized by the Court. . . ."

Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by *Griggs*, supra, where it is held:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. 424, 430-31, 91 S.Ct. 849, 853.

Under the charter and the civil service provisions properly administered, preference is to be accorded to the fire fighter applicant having the highest rating. Under the court's minority preference provision, a White person who, in a subsequently conducted examination fairly conducted and free of racial discrimination, obtains a higher rating than a minority person is denied employment solely because he is a White man. The fact that some unnamed and unknown

White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

In our view, no authority has been cited which would support such racial discrimination. We are convinced that the minority preference provision of the decree discriminates in favor of minority persons and against Whites whose qualifications are fairly established to be superior to minority persons given preference by the decree.

School integration cases such as *Swann*, supra, are clearly distinguishable. Whites have no constitutional right to insist upon segregated schools. No constitutional rights of Whites are involved in decrees ordering school integration.

Cases such as *Local 53 of Int. Ass'n of Heat & Frost I. & A. Workers v. Vogler*, 5 Cir., 407 F.2d 1047, are distinguishable. In *Vogler*, the court upheld the trial court's finding that three Blacks and one Mexican had applied for union membership and had been discriminatorily denied membership solely upon the basis of their race. The court ordered the union to give such identified persons union membership. The relief was granted to specific persons who were wrongly denied membership. Moreover, the issue of reverse discrimination was not raised or considered by the court.

In our present case, there is no claim or showing made that plaintiffs were identified members of the class who made prior applications for employment and were denied employment solely because of race. Thus we do not have a situation where a specified minority person having superior qualifications to a White fire fighter applicant has shown that he,

himself, has been damaged or injured by a discriminatory refusal of employment.

VI.

Defendants claim the injunctive relief granted is too broad in other respects. In *Griggs*, supra, the standard laid down for determining the validity of tests and job standards is thus stated:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431, 91 S.Ct. 849, 853.

Such standard is appropriate to test the relief granted upon the basis of the record made in this case. We shall proceed to examine and determine the validity of the relief granted in paragraphs 4 to 10, inclusive, of the decree, supra.

We affirm and approve the provisions of paragraphs 4 and 5 requiring the reopening of applications for the next examination and the requirement that an affirmative plan for recruitment of minority persons be promptly submitted to the court for approval. We disapprove, however, of that part of paragraph 5(e) which requires publicity for the minority preference provision which we have heretofore disapproved.

The provisions of paragraph 6 are approved and affirmed except for the modification of paragraph 6(d) to the extent that it is consistent with the views expressed in this opinion.

The provisions of paragraph 7(a) relating to the elimination of applicants' arrest records is approved.

The provisions of paragraph 7(b), particularly subdivision (i) thereof, are too broad. The parties agree that a conviction of a felony or misdemeanor should not per se consti-

tute an absolute bar to employment. We are persuaded by defendants' argument that applicants' conviction records, at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a fire department position both from the standpoint of protecting fellow firemen and the public. The trial court in its discretion may require the defendants to submit to it for approval a rule with respect to the consideration to be given to an applicant's conviction record, which at a minimum should not treat conviction as an absolute bar to employment. We would not consider any rule giving fair consideration to the bearing of the conviction upon applicant's fitness for the fire fighter job to be inappropriate.

The provisions of paragraph 7(c) relating to educational requirements are approved and affirmed. We note that no complaint is made that the court did not go far enough in this respect.

The provision of paragraph 7(d) reducing the minimum age requirement is disapproved. Absent racial discrimination, it is appropriate for employers to fix age requirements. There is no adequate evidentiary basis to support a finding that the minimum age requirement is racially discriminatory.

By reason of past racial discrimination, we approve the 7(d) temporary enlargement of the maximum age requirement from thirty to thirty-five years.

The provisions of paragraph 8 are adequately covered by other provisions of the decree.

By reason of the lapse of time from the entry of the decree and the likelihood that changes have subsequently been made, the provisions of paragraph 9 of the decree can to the extent necessary be best realized under the continuing jurisdiction provisions of paragraph 10.

We agree that the court should maintain continuing jurisdiction of this action for a sufficient period of time to reasonably assure it that racial discrimination has been eliminated in filling positions on the fire department. The court may require such reports and information as it deems necessary and issue such orders as may be required to accomplish the objective of eliminating racial discrimination in the employment of fire fighters.

The trial court's determination that past racial discrimination against minority persons applying for fire fighters' positions has been established is affirmed. The court's decree to the extent that it gives absolute preference to twenty applicants is reversed and vacated. In other respects, the court's decree and judgment is affirmed to the extent indicated in this opinion.

The case is remanded for further proceedings consistent with the views herein expressed.

Costs are taxed two-thirds to defendants-appellants and one-third to plaintiffs-appellees.

A true copy.

Attest:

*Clerk, U.S. Court of Appeals, Eighth Circuit.*

# APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1181

Gerald Carter, et al.,
Plaintiffs-Appellees,

and

Minneapolis Commission on Human Relations,
Plaintiff-Intervenor-Appellee,

vs.

Hugh Gallagher, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Minnesota—On Petition for Rehearing En Banc.

January 7, 1972.

Before MATTHES, Chief Judge, VAN OOSTERHOUT, Senior Circuit Judge, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, En Banc.

GIBSON, Circuit Judge.

A panel of this court composed of Matthes, Chief Judge, Van Oosterhout, Senior Judge, and Eisele, District Judge from the Eastern District of Arkansas sitting by designation, in an opinion, authored by Judge Van Oosterhout,[1]

[1]No. 71-1181. September 9, 1971.

sustained the order and opinion of the Honorable Earl R. Larson, District Court of Minnesota, finding that the employment practices and procedures for determining qualifications of applicants for positions on the Minneapolis Fire Department were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1870, 42 U.S.C. § 1981, and approved a number of corrective practices ordered so as to eliminate all racially discriminatory practices; but disapproved that part of Judge Larson's order providing for absolute minority preference in the employment of the next 20 persons to be hired by the department. The case was brought as a class action and relief was extended to minority groups as a class.

The panel opinion, while sustaining most of Judge Larson's findings and orders granting affirmative relief, did not approve of the absolute preference in Fire Department employment to 20 minority persons who met the qualifications for the positions under the revised qualification standards established by the decree and held that the absolute preference order infringed upon the constitutional rights of white applicants whose qualifications are established to be equal or superior to the minority applicants. That panel held:

> "Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by *Griggs*, supra, where it is held:
>
> > 'Congress did not intend by Title VII, however to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a

> member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' 401 U.S. 424, 430-31, 91 S.Ct. 849, 853, 28 L.Ed.2d 158."

A petition for rehearing en banc by the appellees was granted but limited solely to the issue of the appropriate remedy. The cause was resubmitted to the court en banc on briefs of the various parties and intervenors and without oral argument. The United States filed a brief as amicus curiae on behalf of the plaintiffs on the rehearing.

The facts are contained in the panel opinion and need not be repeated here. The fact of past racially discriminatory practices and procedures in employment by the Fire Department is accepted and clearly evidenced by the fact that of the 535 men in the Fire Department none are from minority groups.[2] We are thus here concerned only with the appropriateness of the remedy ordered by the District Court. The absolute preference of 20 minority persons who qualify has gone further than any of the reported appellate court cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified.

The panel opinion has recognized the illegality of the past practices, has ordered those practices abandoned, and the affirmative establishment of nondiscriminatory practices

---

[2]The total minority population of the Minneapolis area was 6.44 per cent in 1970; black population 4.37 per cent.

and procedures. There is, as the panel pointed out, no claim or showing made that the plaintiffs were identifiable members of the class who had made prior applications for employment and were denied employment solely because of race. This latter situation could be remedied immediately by ordering the employment of such persons. However, in dealing with the abstraction of employment as a class, we are confronted with the proposition that in giving an absolute preference to a minority as a class over those of the white race who are either superiorly or equally qualified would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

The defendants-appellants point out the mandatory requirements of the Minneapolis City and the Minnesota Veterans' Preference Act (Minnesota Statute 197.45). These requirements however must give way to the Supremacy Clause of Article 6 of the United States Constitution.

Mr. Justice Black, in speaking for a unanimous court (although Mr. Justice Harlan concurred on the basis of the Fifteenth Amendment rather than on the Fourteenth) in *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1964), approved the suspension of Louisiana voting laws that had been administered discriminatorily against Negroes and held it was the affirmative duty of the district court to eliminate the discriminatory effects of past practices, stating, "We bear in mind that the court has not merely the power but the duty to render a decree which so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154, 85 S.Ct. at 822. It is apparent that remedies to overcome the effects of past discrimination may suspend valid state laws. *United States v. Mississippi*, 339 F.2d 679

(5th Cir. 1964); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1963).

Admittedly the District Court has wide power sitting as a court of equity to fashion relief enforcing the congressional mandate of the Civil Rights Acts and the constitutional guarantees of the Equal Protection of the Law; and clearly, courts of equity have the power to eradicate the effects of past discriminations. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1971). We are not here concerned with the anti-preference treatment section 703 (j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j),[3] as this class action is predicated under § 1981 of the old Civil Rights Act and the provisions of the Fourteenth Amendment. However, even the anti-preference treatment section of the new Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. *United States v. IBEW, Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970).

Although this case is not predicated upon Title VII of the Civil Rights Act of 1961 and most of the cases that have

---

[3] 42 U.S.C. §2000e-2(j) provides as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

dealt with the issue of remedying past discriminatory practices along with prohibiting present discriminatory practices are under that Act, the remedies invoked in those cases offer some practical guidelines in dealing with this issue.

As the panel opinion points out most of these cases deal with discriminations to a specified individual who has been presently discriminated against on account of race, and the remedy is there easily applied as the individual who has been discriminated against can be presently ordered employed without running into the constitutional questions involved in granting preference to any one class over another. However, in *United States v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied* 404 U.S. ....., 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), the Ninth Circuit approved the district court decree ordering building construction unions to offer immediate job referrals to previous racial discriminatees and also approved a prospective order requiring the unions to recruit sufficient blacks to comprise a 30 per cent membership in their apprenticeship programs. This was ordered in Seattle which had a black population of approximately 7 per cent. See *United States v. Local No. 86, Int. Ass'n of Bridge S., D. and R. Iron Workers, et al.*, 315 F. Supp. 1202 (W.D.Wash. 1970).

In *Local 53 of Int. Ass'n of Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the trial court ordered the immediate admission into the union of three Negroes who were racially discriminated against in their application for membership and voided a local membership rule that in effect made the union a self-perpetuating nepotistic group, specifically ordering the union to develop objective criteria for membership and prospectively ordering the alternating of white and Negro referrals.

In *United States v. Central Motor Lines, Inc.*, 325 F.Supp. 478 (W.D.N.C. 1970), the trial court issued a preliminary injunction requiring the motor carrier to hire six Negro drivers "promptly," (apparently within two weeks from the date of the order), and that any future drivers hired were to be in an alternating ratio of one black to one white.

Cases arising from Executive Order #11246, prohibiting all contractors and subcontractors on federally financed projects from discriminating in their employment practices, have also upheld plans which establish percentage goals for the employment of minority workers. See *Contractors Association of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971) (upholding the "Philadelphia Plan" requiring minority employment goals in the construction trades ranging from 19 per cent - 26 per cent); *Joyce v. McCrane*, 320 F.Supp. 1284 (D.N.J. 1970) (requiring contractors to employ 30 per cent - 37 per cent minority journeymen).

It is also appropriate to note that precedent from our own Circuit establishes that the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination. In *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969), we required substantial changes in union referral systems. In connection with this holding, Judge Heaney noted:

> "We recognize that each of the cases cited in n. 15 to support our position can be distinguished on the ground that in each case, a number of known members of a minority group had been discriminated against after the passage of the Civil Rights Act. Here, we do not have such evidence, but we do not believe that it is necessary. The record does show that qualified Negro tradesmen have been and continue to be residents of the area. It further shows that they were acutely aware of the Lo-

cals' policies toward minority groups. It is also clear that they knew that even if they were permitted to use the referral system and become members of the union, they would have to work for at least a year before they could move into a priority group which would assure them reasonably full employment. In the light of this knowledge, it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a non-construction white employer would seek to use the referral systems or to join either Local." *Id.* at 132.

It may also be pointed out that in actions under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., Congress has specifically granted authority to the trial courts to "order such affirmative action as may be appropriate, which may include * * * *hiring of employees* * * *." 42 U.S.C. §2000e-5(g) (emphasis added).

None of the remedies ordered or approved in the above cases involved an absolute preference for qualified minority persons for the first vacancies appearing in an employer's business, in contrast to the remedy ordered in the instant case. The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices. *Louisiana v. United States, supra.* To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area. Such a procedure does not constitute a "quota" system

because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions. However, as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, more than a token representation should be afforded. For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without denying the constitutional rights of others by granting an absolute preference.

Ideas and views on ratios and procedures may vary widely but this issue should be resolved as soon as possible. In considering the equities of the decree and the difficulties that may be encountered in procuring qualified applicants from any of the racial groups, we feel that it would be in order for the district court to mandate that one out of every three persons hired by the Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired.

Fashioning a remedy in these cases is of course a practical question which may differ substantially from case to case, depending on the circumstances. In reaching our conclusion in the instant case, we have been guided to some extent by the following considerations:

(1) It has now been established by the Supreme Court that the use of mathematical ratios as "a starting point in the process of shaping a remedy" is not unconstitutional and is "within the equitable remedial discretion of the District

Court." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

(2) Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.

(3) As the panel opinion noted, testing procedures required to qualify applicants are undergoing revision and validation at the present time. As the tests are currently utilized, applicants must attain a qualifying score in order to be certified at all. They are then ranked in order of eligibility according to their test scores (disregarding for present purposes the veterans' preference). Because of the absence of validation studies on the record before us, it is speculative to assume that the qualifying test, in addition to separating those applicants who are qualified from those who are not, also ranks qualified applicants with precision, statistical validity, and predictive significance. See generally, Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1669 (1969). Thus, a hiring remedy based on an alternating ratio such as we here suggest will by no means necessarily result in hiring less qualified minority persons in preference to more qualified white persons.

(4) While some of the remedial orders relied on by the plaintiffs and the Government ordered one to one ratios, they appear to be in areas and occupations with a more substantial minority population than the Minneapolis area. Thus

we conclude that a one to two ratio would be appropriate here, until 20 qualified minority persons have been hired.

The panel opinion is adopted as the opinion of the court en banc with the exception of that part relating to the absolute preference.

The District Court properly retained jurisdiction pending full implementation of its decree and the remedy. Cause is remanded for further proceedings consistent with this opinion.

All costs of the appeal are to be assessed three-fourths against the defendant-appellants and one-fourth against the plaintiffs-appellees.

MATTHES, Chief Judge, concurring.

As the panel opinion shows, I was opposed to the absolute preference requirement as enunciated in the district court's opinion. Upon consideration of the petition for rehearing en banc, and briefs filed in support and opposition to the rehearing, I have concluded that the remedy fashioned by the opinion authored by Judge Gibson is appropriate and should be granted. Accordingly, I concur in the majority opinion on the petition for rehearing en banc.

VAN OOSTERHOUT, Senior Circuit Judge, dissenting.

For reasons stated in Division V of the panel opinion in this case, reported at 452 F.2d 324, I dissent from the en banc mandatory determination that one out of three persons hired by the Fire Department shall be a minority person until at least twenty minority persons are hired. Such provision in my opinion is vulnerable to the same constitutional infirmity as Judge Larson's absolute preference provision. This court's minority preference provision will not discriminate against as many white applicants as Judge Larson's

decree but it will still give some minority persons preference in employment over white applicants whose qualifications are determined to be superior under fairly imposed standards and tests.

Employment preferences based on race are prohibited by the Fourteenth Amendment. This case is distinguishable from *Swan v. Charlotte-Mecklenburg Board of Education* relied upon by the majority in that whites have no right to insist upon segregated schools, while white as well as Black applicants cannot be denied employment on the basis of race.

I agree that a court of equity has broad power to frame an appropriate decree but such power does not extend to establishing provisions which deprive persons of constitutionally guaranteed rights.

Present and future applicants for firemen positions are in no way responsible for past discrimination. Plaintiffs have not shown that any plaintiff now seeking employment has personally suffered as a result of past discrimination by being denied employment over a less qualified white person. Past general racial discrimination against Blacks under the circumstances of this case does not justify unconstitutional present racial discrimination against white applicants. The court should of course go as far as is constitutionally permissible to eliminate racial discrimination in employment of firemen. Substantial steps in that direction have been taken by other provisions of Judge Larson's decree and the panel opinion.

Mehaffy, Circuit Judge, joins in this dissent.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

# APPENDIX III

## THE CHARTER OF THE CITY OF MINNEAPOLIS ADOPTED AT GENERAL ELECTION OF NOVEMBER 2, 1920

### CHAPTER XIX

### Civil Service

### (PERTINENT PROVISIONS)

**Section 1. Civil Service Commissioners of Minneapolis, to be Appointed by Mayor with Approval of a Majority of City Council and to Receive Salary of $1500 Per Annum Each—Mayor to File Name of Persons Whom He Proposes to Appoint.**—There shall be in the City of Minneapolis a Civil Service Commission (hereinafter called the commission) of three commissioners, who shall be citizens of the state and residents of the city, and for this service each commissioner shall receive $1500 per annum as compensation, payable in equal monthly installments. No commissioner shall at the time of his appointment, or while serving, hold any other office or employment under the city, the United States, the State of Minnesota, or any public corporation or political division thereof other than the office of Notary Public. The Mayor shall, with the consent and approval of the City Council, expressed by a majority vote thereof, appoint as commissioners, persons known to favor the principle of merit and efficiency in the public service.

**Section 7. Commission to Make; Alter and Change Rules —Appointment of Non-Skilled Laborers Without Examination.** The commission shall, from time to time, make, amend, alter and change rules, to promote efficiency in the city service and to carry out the purposes of this chapter. The rules shall provide, among other things, for: (City Council Ordinance 7-2-68)

a. The classification of all offices, positions and employments in the classified service.

b. Public competitive examination to test the relative fitness of applicants.

c. Public advertisement of all examinations at least ten days in advance, in at least one newspaper of the city of general circulation, and posting such advertisement a like time in a conspicuous place in the city hall. (City Council Ordinance 7-2-68)

d. The creation of lists of eligible candidates after successful examination, in the order of their standing in the examination, and without reference to time of examination. Such lists shall be embraced in an eligible register. The commission may by rule provide for striking any name from the eligible register after it has been two years thereon.

e. The rejection of candidates or eligibles who, after the entry of their names, shall fail to comply with the reasonable rules and requirements of the commission in respect to age, residence, physical condition or otherwise, or who have been guilty of criminal, infamous or disgraceful conduct, or of any willful misrepresentation, deception or fraud in connection with the examination or in connection with their applications.

f. The certification of the name standing highest on the appropriate list to fill any vacancy.

[g and h omitted.]

i. Promotion based on competitive examination and upon records of efficiency, character, conduct and seniority. Promotion shall be deemed, among other things, to include increase in salary, and the rules shall be framed to encourage the filling of vacancies by promotion rather than otherwise.

[j, k and l omitted.]

Section 12. Duties of Each Office to Be Ascertained and

Class and Grade Established. The commission shall ascertain the duties of each office, position and employment in the classified service, and designate by rule as well as may be practicable, the grade and title of each office, employment or position. Each class shall comprise those offices, employments and positions having substantially similar duties. The commission shall by rule indicate the lines of promotion from each lower to higher grade wherever the experience derived in the lower tends to qualify for the higher. The commission shall prescribe standards of efficiency for each office, position and employment and for each class, and adapt its examinations thereto. The commission shall make and keep a record of relative efficiency of each employee in the classified service other than unskilled laborers, and shall provide by rule methods for ascertaining and verifying the fact from which such records of relative efficiency shall be made. (City Council Ordinance 7-2-68).

Section 13. Conduct of Examinations. All examinations shall be impartial, fair and practical and designed only to test the relative qualifications and fitness of applicants to discharge the duties of the particular employment which they seek to fill. No question in any examinations shall relate to the race, or national origin, political or religious convictions or affiliations of the applicant. All applicants for positions of trust shall be specially examined as to moral character, sobriety and integrity, and all applicants for positions requiring special experience, skill or faithfulness shall be specially examined in respect to those qualities. Where written answers are required from applicants for positions calling for expert knowledge the rules may provide for examination of the answers and the comparative ranking of the various applicants, without a disclosure of the names of the applicants to the examiners. The commission may furnish to the

chief examiner such assistance as may be necessary. It shall be the duty of every employee of the city to act as an examiner or assistant examiner, at the request of the commission, without special compensation therefor. The members of the commission, collectively or individually, may act as examiners or assistant examiners. (City Council Ordinance 7-2-68)

Section 14. Notice of Examination. Notice of the time, place, and scope of each examination shall be given by publication and posting, as specified in section 7, and by mailing to each applicant upon the appropriate list of the application register ten days in advance. The names of those found eligible after giving credit for character and previous successful experience, shall be entered, with their addresses and percentages, in appropriate lists of the eligible register. No names shall remain upon the eligible register more than two years without a new application, and, if the rules of the commission so require, a new examination.

Section 15. Filling of Vacancies. When a vacancy is to be filled in the classified service, the Mayor, City Council, board, commission or employing officer shall notify the commission, and the commission shall certify the highest name from the appropriate list of the eligible register, except in the case of unskilled labor, and then shall certify the name first in time on the list. All vacancies shall be filled from the names so certified, and the commission shall be immediately notified of the employment, and of the compensation to be paid. The names selected shall be stricken from the eligible register and transferred to the service register. All changes in grade, title or compensation shall be likewise reported.

## APPENDIX IV

### RULES, CIVIL SERVICE COMMISSION OF CITY OF MINNEAPOLIS, AS AMENDED THROUGH NOVEMBER 2, 1970

(PERTINENT PROVISIONS)

5.06 *Competitive Examinations.*

All competitive examinations for positions in the classified service shall relate to those matters which will fairly test the capacity and fitness of the persons examined to discharge efficiently the duties of the office or employment sought by them. Any means or measures may be used which are reasonably well calculated to test the fitness of the candidates to become employees in positions of the class for which the examination is held.

Such means or measures may include any required statement or any investigation of education, experience, or record of accomplishment; any test of knowledge, skill, capacity, intelligence or aptitude; and any inquiry into the moral character, or any other quality or attribute which, in the judgment of the Commission, seems desirable. (C.C. XIX Sec. 13)

No test or question in any application or examination shall be constructed to call for or lead to disclosure of any information concerning any political, religious, fraternal, or racial affiliations. Any disclosure thereof shall be discountenanced, and any such information which may nevertheless be revealed, shall be disregarded.

The tests in any examination for promotion shall be of like kind and character to the corresponding tests in any examination for original appointment to positions of the same class, and the same standards shall be applied to the

rating thereof. In addition to other factors, promotional examinations shall take into consideration a rating on seniority, efficiency, character and conduct. (C.C. XIX Sec. 7)

5.08 *Concealing Identity.*

On the date of the written examination, the identification sheets of the candidates shall be sealed and the identity of each shall remain hidden until the papers have been graded, provided, that when specified ratings have been required in one or more subjects prior to the completion of the examination, the identification envelopes may be opened on the establishment of such ratings in order to notify applicants to appear for the remainder of the examination. (C.C. XIX Sec. 13)

5.09 *Subjects and Weights.*

Appropriate scientific techniques and procedures shall be used in rating the results of examinations and determining the relative rankings of the competitors. Each examination shall embrace certain subjects, to which weights shall be assigned, the weight given to each subject to represent its value in ascertaining the fitness of applicants. Each subject of examination shall be rated independently by the examiners.

The rating on the scale of 100 on each subject shall be multiplied by the weight assigned to such subject. The resulting products shall be added and the total product divided by the total weights of all subjects in the examination. The resulting quotient is the general average which shall be used in determining the order in which the name of the candidate shall appear upon the eligible register. The commission shall determine the subjects and relative weights given to each subject.

# APPENDIX V

## MINNESOTA STATUTES 1969

## VETERANS PREFERENCE ACT, §197.45

197.45 Preference in Public Appointments. Subdivision 1. Veteran defined. The word "veteran" as used in this section and section 197.46 means any man or woman honorably discharged from the army, navy, marine corps, or Women's Auxiliary Army Corps of the United States in the Civil War, Spanish-American War, Philippine Insurrection, China Relief Expedition, or any armed expedition for which Congress has awarded a campaign badge or medal, World War wherein the United States of America and the allied nations of England, France, and others were engaged in war against the Imperial German Government and its allies, and any other person who, on or after December 7, 1941, has been honorably discharged or separated from any branch of the armed forces of the United States (1) after having served on active duty for other than training purposes or (2) by reason of disability incurred while serving on active duty, who is a citizen of the United States, and has been a resident of the state of Minnesota and of the county, city, town, village, school district, or political subdivision thereof to which application is made for five years immediately preceding his application, or who enlisted from the state of Minnesota, and persons who served in the active military or naval service of any government allied with the United States in World War I or World War II, and have been honorably discharged therefrom, and who are citizens of the United States and were such citizens at the time of entrance into such active service, and have been residents of the state of Minnesota five years immediately preceding their application or who enlisted from the state of Minnesota.

Subd. 2. Preference to war veterans in public appointments. That in every public department and upon all public works in the state of Minnesota and the counties, cities, towns, villages, school districts, and all other political subdivisions and agencies thereof, honorably discharged veterans shall be entitled to preference in appointments, employment and promotion over other applicants therefor, and the persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age and disability does not render him incompetent to perform properly the duties of the position applied for and when such veteran shall apply for appointment or employment under sections 197.45 and 197.46, the officer, board or person whose duty it is, or may be, to appoint or employ such person to fill such position or place, shall before appointing or employing anyone to fill such position or place, except where said veteran has already been qualified under civil service for the position applied for, make an investigation as to the qualifications of said veteran for such place or position, and if he is of good moral character, and can perform the duties of said position applied for by him, as hereinbefore provided, said officer, board or person shall appoint said veteran to such position or place of employment.

In any governmental agency having an established civil service or merit system, no inquiry shall be made of any applicant for examination before such examination as to whether or not he is a veteran, nor shall any distinction be made in giving the examination or grading the results thereof on account of the fact that the applicant may be a veteran; provided, that this shall not abridge any preference to which such veteran is entitled. All governmental agencies when notifying the applicant that he has passed, shall inform the ap-

plicant of the right of a veteran to preference. The proper civil service or merit system authority shall certify his appointment and the appointing authority shall appoint such veteran before any other person is certified or appointed to fill a position for which the veteran has passed the examination.

A refusal to allow the preference provided for in this and the next succeeding section to any such honorably discharged veteran, or a reduction of his compensation intended to bring about his resignation or discharge, shall entitle such honorably discharged veteran to a right of action therefor in any court of competent jurisdiction for damages, and such officer and the persons responsible for such refusal if such refusal was wilful shall be personally liable therefor, and also for a remedy for mandamus for righting the wrong.

Subd. 3. Promotional examinations. In any governmental agency having an established civil service or merit system where an applicant is a veteran and he has passed the promotional examination, he may elect to have a credit of five points to the examination rating. The decision to make such election may be made either before or after the examination. If the election is made and the promotion is gained, such election shall preclude the use of a five point preference in further promotions. The name of the veteran or disabled veteran with such augmented rating shall be placed on the list of eligibles along with other eligible persons for the position or place, but the name of the veteran shall be entered ahead of a non-veteran when the ratings are the same.

Subd. 4. Widows to have rights and privileges. The widows of deceased veterans and the spouses of disabled veterans who, because of such disability, are unable to qualify, shall have all the rights and privileges given to a veteran by this section or by section 197.46.

# AMICUS CURIAE BRIEF

LIBRARY
SUPREME COURT, U. S.

# Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

*Petitioners,*

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF OF AMICUS CURIAE CHARLES STENVIG, MAYOR OF THE CITY OF MINNEAPOLIS, MINNESOTA

KEITH M. STIDD
City Attorney
G. V. JOHNSON
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2013
*Attorneys for Amicus Curiae, Charles Stenvig*

1972—Northwest Brief Printing Co., 322 South Fourth St., Minneapolis 55415 338-5078

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of Amicus Curiae | 2 |
| Argument | 3 |
| Conclusion | 5 |
| Appendix A—Minnesota Statutes 363.03 | A-1 |
| Appendix B—Minneapolis Code of Ordinances 945.030 | A-2 |


## TABLE OF AUTHORITIES


**Cases:**

| | Page |
|---|---|
| Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971) | 3, 4 |

**Statutes:**

| | |
|---|---|
| 42 U.S.C.A. § 1981 | 3 |

# Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

*Petitioners,*

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF OF AMICUS CURIAE

## CHARLES STENVIG, MAYOR OF THE CITY OF MINNEAPOLIS, MINNESOTA

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, and with the consent of the parties, which consents have been filed with the Clerk of this Court, Charles Stenvig, Mayor of the City of Minneapolis, Minnesota, respectfully files this brief as amicus curiae.

## INTEREST OF AMICUS CURIAE

The interest of the Mayor of the City of Minneapolis derives from his position as chief executive officer of said City. Upon assuming the duties of such office, he took an oath to "support the Constitution of the United States, the Constitution and the Laws of the State of Minnesota, and the Ordinances of the City of Minneapolis". The relevant portions of Minnesota Statutes, Section 363.03 and Section 945.030 of the Minneapolis Code of Ordinances, are respectively set out in Appendices A and B hereto. Both prohibit discrimination based on race, national origin, or color in hiring by public or private employers.

The Mayor of Minneapolis is elected by the citizens of the City pursuant to their Home Rule Charter, which provides the following, in addition to his other duties:

> "Section 1. *Powers and Duties of Mayor.* The Mayor shall take care that the laws of the State and the ordinances of the City are duly observed and enforced within the City. He shall take care that all other officers of the City discharge their respective duties, and to that end may maintain an action of mandamus or other appropriate action against any delinquent City officer."

Administrative officials of governments, not only in Minneapolis or within the jurisdiction of the Eighth Circuit, but nation-wide, should have a decisive answer from the United States Supreme Court if prior interpretations of the Federal Constitution and Federal Civil Rights Acts as they relate to governmental employment are to be changed.

## ARGUMENT

The opinion of the United States Court of Appeals for the Eighth Circuit, dated January 7, 1972, (Petitioners' Appendix II, A-23) requires the City of Minneapolis to engage in discriminatory hiring procedures. It requires that, notwithstanding the relative ability of applicants for positions in the City's Fire Department, hiring preference be given for one-third of those positions to persons of a particular color, ancestry, or having a particular type of surname. Such persons had been given absolute preference for such positions by order of the Federal District Court. The Circuit Court recognized that such order violated Federal Civil Rights Laws, and deprived equally or superiorly qualified persons not within such limited classification of their rights under the Federal Constitution. The Circuit Court then substituted its own formula for such hiring, limiting the deprivation of constitutional rights to a portion, rather than all, of the equally or superiorly qualified applicants not within such classification.

42 U.S.C.A. § 1981 provides in part "*All* persons . . . shall have the *same* right in every state . . . ." By the use of such language in the Civil Rights Act Congress has prohibited, both totally or on a partial basis, the granting of superior rights to employment to persons of a particular color, ancestry, or surname. The recent opinion of this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971), states:

> "Congress did not intend by Title VII (of the Civil Rights Act of 1964), however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority,*

*is precisely and only what Congress has prescribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

* * * * *

*"Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins.* Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (Emphasis supplied.)

Such interpretation is no less applicable to the instant case than to *Griggs, supra.*

It is recognized that administrative problems and lawsuits may result from the absence of definitions in the Circuit Court opinion. Their extent and complexities are unknown at this time, but may involve questions such as:

Is the discriminatory preference in hiring to be given only to persons with totally black skin as opposed to persons of the Negro race whose skin may be dark brown? If not, where is the division line as to color?

Is the discriminatory preference to be given only to persons of one hundred per cent American Indian blood, as opposed to a person who is 31/32 Indian and 1/32 some other racial heritage? If not, where is the division line as to race?

What is a Spanish surname? How must it have been acquired?

Although such questions may seem facetious, they are of concern to administrators who must, under the Circuit Court opinion, discriminate in the hiring of individuals on the basis of their color, race, or surname.

## CONCLUSION

Equal opportunity for employment cannot be equated to minority preferences. The citizens of Minneapolis should be permitted to hire for its Fire Department the most highly qualified applicants, notwithstanding their color, race or surname.

A Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

KEITH M. STIDD
City Attorney
and
G. V. JOHNSON
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2013
*Attorneys for Amicus Curiae,*
*Charles Stenvig*

# APPENDIX A

## Minnesota Statutes

"363.03. UNFAIR DISCRIMINATORY PRACTICES. Subdivision 1. *Employment.* Except when based on a bona fide occupational qualification, it is an unfair employment practice:

* * *

(2) For an employer, because of race, color, creed, religion, national origin, or sex,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes an applicant for employment; or

(b) to discharge an employee;

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment;

* * *

(4) For an employer, employment agency, or labor organization, before an individual is employed by an employer or admitted to membership in a labor organization, to

(a) require the applicant to furnish information that pertains to the applicant's race, color, creed, religion or national origin, unless, for the purpose of national security, information pertaining to the national origin of the applicant is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the purpose of compliance with the public contracts act information pertaining to the race, color, creed, religion or national origin of the applicant is required by the United States or a political subdivision or agency of the United States; or

(b) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion, national origin, or sex.

* * *"

---

## APPENDIX B

### Minneapolis Code of Ordinances

"945.030. *Violations.*

(a) *Act of Discrimination.* Without limitation the following are declared to be discrimination:

(1) For an employer, because of race, color, creed, religion, ancestry, national origin, or sex to fail or refuse to hire; to discharge an employee; or to accord adverse, unlawful or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, discharge, or any term or condition of employment except when based on a bona fide occupational qualification. * * *"

---